The Smith Commission and competition policy–more power for Scottish Ministers?

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To look at the figures, one could think that in Scotland "we do not do competition law": cases in this area have been few and far between. Even the merger notification concerning BritVic and Barr, while looking "truly Scottish" (due to the leading role of Irn Bru in the market for carbonated drinks North of the Border), showed its farther reaching scope, by revealing a much wider, UK-wide relevant market.
It must be recognised that since its inception, the Competition and Markets Authority has made concrete efforts to become more "visible" in Scotland: as part of its drive toward boosting the role of the Office for Devolved Nations, which is responsible not just for Scotland but also for Wales and Northern Ireland, the Authority now relies on these peripheral offices as vital centres of intelligence and focal points for the creation of strong relations with local stakeholders, so as to make the action of the CMA more responsive to the demands of local economies, regulatory structures and market dynamics. Arguably, the fruits of this renewed commitment are already visible: the OFT/CMA conducted an extensive market study (see: http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2012/09-12) concerning the economic challenges faced by communities living in the most remote areas of the UK, with a strong focus on Scotland and on that basis concrete measures were adopted to ease the burden placed upon them, inter alia, in the purchase of fuel (see e.g.: https://www.gov.uk/government/news/ten-rural-areas-in-uk-could-get-fuel-duty-tax-cut).
However, the enforcement of competition law, both in respect of Competition Act investigations and merger notifications is eminently UK-wide: among others, the Review of devolved powers conducted by the Calman Commission expressly recommended maintaining the status quo and thus the 'reserved' nature of policy areas such as competition policy, consumer protection and financial regulation, so as not to undermine the integrity and good functioning of the UK-wide single market (see: http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf, pp. 208-209).

Five years on, these issues have been brought back to the fore in the aftermath of the Scottish Independence referendum: should a more autonomous Scotland, with a far stronger Parliament and a Government enjoying more extensive powers, be also responsible for running "its own" Competition authority? In other words, should competition policy become a devolved matter to Edinburgh, or should it remain within those policy areas within the remit of Westminster?

It is clear that an answer to this question cannot just be based on administrative convenience, but rather, must be given having regard to the extent to which any change is likely to deliver concrete benefits for the economy and for consumers by means of a framework that works effectively and fairly in applying the competition rules to individual cases. To meet these objectives a number of options can be envisaged, from the most radical ones, involving the creation of a "Scottish Competition Office", to less ground-breaking alternatives, which leave untouched the exclusive powers of the CMA as a "UK wide" authority while empowering the Scottish Ministers to influence the Authority's exercise of its functions. Undoubtedly, however, the first issue that needs to be addressed while interrogating issues of "devolution" in the field of competition enforcement is one of a substantive nature that also has considerable "practical consequences": is there any such thing as "purely Scottish" competition case? Admittedly, this question calls into consideration our current understanding of market definition and especially of what we mean as "geographic market". As the already cited Britvic/Barr merger case showed it is very difficult to identify a case that affects primarily (never mind exclusively) markets

within Scotland: in that decision, the Office acknowledged that AG Barr's presence was significant and "substantially greater" North of the Border than in the rest of the UK: however, in the end it excluded that the relevant market should be confined to Scotland on the ground that, while consumer preferences were determined by behaviour of individuals localised in certain areas, product quality was uniform across the whole of the country (see ME/5801/12, AG Barr/Britvic, 13 February 2013, para. 40-41; see also para. 45). It was also emphasised that prices for carbonated soft drinks tended to be the complex outcome of supply and distribution patterns that are equally nationwide, thus allowing the suppliers to "arbitrate" any difference in prices by, for instance, increasing or decreasing supplies in different local areas within the country (see para. 41); consequently, although the Office accepted the need to take into account any material differences affecting the trade of the merging parties in Scotland (see para. 47), it identified the geographic market as coinciding with the UK as a whole. Thus, it is argued that it may be very difficult to identify a "purely Scottish" case, due to the circumstance that the UK as a whole represents a deeply integrated internal market, in which any "local differences" are liable to lead to the identification of "local markets" only in very limited cases.

It is suggested that these observations appear to be confirmed by the OFT/CMA practice. In its submission to the Smith Commission (see: https://drive.google.com/folderview?id=0B1huTD2v1zfWaU93bTIxMVJDQUk&usp=sharing#, p. 14-15), the Competition and Markets Authority reported that since 2004 a total of 7 competition/consumer cases lodged with the OFT had been judged to be "relevant" for Scotland, in the sense of affecting "local markets" therein; this figure should be compared with the overall workload of the OFT. Just in 2013/14 the Office issued 4 infringement decisions (see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322820/9988-2901757-TSO-OfT_Annual_Report_Web_ACCESSIBLE.pdf, p. 23). Notifications of mergers affecting markets within Scotland were admittedly more numerous, averaging 3 or 4 per year: if compared with the "UK-wide" cases, however, their number appears significantly smaller; in its 2013/14 report, the Competition Commission (now merged with the OFT in the CMA) reported having progressed 12 inquiries, among which 2 were "leftovers" from previous years (see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322811/40626_2902424_ p. 12). Against this background, it can legitimately be doubted that there could be a sufficiently strong "critical mass" as to justify a sizeable transfer of resources aimed at creating a Scottish Competition authority.

Numbers, however, should not be the only decisive factor : compliance costs arising from the need for businesses to "adjust" to a different institutional set up as well as potentially "expensive" consequences stemming from the application of potentially differing standards and approaches North and South of the border, respectively, should equally be regarded as relevant in this assessment. In this respect, the circumstance that Scottish firms are in the main engaged in substantial cross-border trade with the rest of the UK could mean that differences in policy may cause them to face financial and logistical burdens connected with having to adjust to the changed and more complex enforcement landscape (see e.g. CMA submission to the Smith Commission, pp. 6-7).

This option is not however the only avenue for devolving competition powers to Edinburgh: the submission made by the Liberal Democrats to the Smith Commission (see: https://www.smith-commission.scot/wp-content/uploads/2014/10/Scottish-Liberal-Democrats-Submission-1.pdf), among others, outlined a number of potentially promising mechanisms and approaches through which power can be flexibly and efficiently transferred to the Scottish Ministers in the regulatory sphere, without necessarily entailing the creation of new agencies (p. 5): the submission outlined a range of formalised partnership working arrangements, under which the competent Scottish authorities would be consulted, and "timing mechanisms" designed to allow the outcome of these consultations to be appropriately taken into account, as well as the conferral upon the Scottish ministers of "powers of initiation, "enabling (...) [them] to request formally" that another agency, enjoying UK-wide powers, "take specific necessary action to facilitate policy objectives" in its area of competence in cases having impact on Scotland (see pp. 8-9). The Lib-Dem submission made clear that these arrangements should be "formalised" in

the sense of being given statutory footing, as opposed to being merely outlined in concordat-type sources, to secure greater legal certainty and engender trust among all interested parties.

It is acknowledged that UK Ministers already enjoy powers that are akin to the ideas of "initiation" and partnership in decision-making in the field of competition, to be exercised vis-a-vis the CMA: according to Section 139 of the Enterprise Act 2002, Ministers can "refer" to the CMA matters of public interest arising from market investigation cases; references may be "full" or "restricted. Following a "full" reference the CMA is required to investigate these matters of public interest in the context of its competition investigation and if it finds that action should be taken by the Secretary of State to address public interest matters, it should report specifically to them to that effect. The Secretary of State is then empowered to decide on whether to make an adverse public interest finding and, if that decision is warranted, to decide also how to address any adverse effects. If instead the Secretary of State wishes to retain its power to consider the public interest issues, it will adopt a "restricted" reference, as a result of which the CMA can only investigate the competition profiles of a given matter and report to the Secretary of State on whether it considers that action should be taken on his or her part. In addition, the Competition Act 1998 allows Ministers to issue orders designed to exclude the applicability of the competition rules in exceptional cases, namely when either "compelling reasons of public policy" so require or when this is necessary to avoid a conflict between the application of the competition rules and the fulfilment of international obligations. And finally, it should be recalled that the Secretary of State can intervene in merger cases for the purpose of upholding public interest considerations. This power was deployed inter alia in respect of the merger between Lloyds and HBOS, in order to protect the financial stability of the UK. It should be emphasised that so far the UK Ministers have made use of this range of powers very sparingly: as was highlighted by the CMA in its submission to the Smith Commission, this reflects a wider trend toward strengthening the independence of the British competition agency vis-a-vis governmental pressure and consequently toward ensuring that the CMA can perform its statutory function away from political interference (see pp. 10-11, CMA submission). However, it is equally clear that especially in cases presenting important public interest profiles, some space for reciprocal "dialogue", albeit within limited and well-defined frameworks, between the competition officials and the Government may be required. It is argued that the current legislative framework governing governmental intervention in CMA activity is characterised by strong checks and balances to minimise the possibility of such interference–for instance, there are only limited grounds for intervention and the CMA remains ultimately responsible for identifying "public interest issues" e.g. in the context of market references.

It is against this background that the proposals made by the Smith Commission should be examined: the final report calls for the power currently enjoyed by UK Ministers to request the CMA to carry out a full phase II market investigation with a view to examining "particular competition issues arising in Scotland". While the details are yet to be determined, it is already clear that the Smith Commission sees the Scottish Ministers' powers in this area as liable to being "stretched" as far as those enjoyed by their Westminster counterparts. Thus, it could be expected that the same "checks" and "balances" characterising the exercise of these powers on the part of the latter are also going to govern analogous action adopted by members of the devolved administration, with evident benefits for legal certainty and for maintaining the independence of the CMA itself.

What remains, however, open to question is the extent to which this mechanism will be applicable in practice, due to the difficulties associated with market definition and especially with identifying "genuinely Scottish cases", that have been already briefly examined: in other words, it is uncertain whether, even when a reference was made on the part of Scottish Ministers, the CMA would be obliged to continue its investigation if the case in issue turned out to be of concern to the UK, seen as a whole. Would the Scottish Ministers be in a position of enjoining the agency's discretion as to whether to take on a new case as a matter of "policy priority"? Or would the case just "join the queue" in the context of the CMA's normal priority setting functions? Furthermore, it is open to discussion what the position of the members of the Scottish Government would be if the reference affected industries in respect of which the devolved administration had no power to legislate (see to this effect the thoughtful discussion contained in the CMA submission, at p. 11-12). Ultimately there is the much vexed question

of resource allocation: who "would pay for" Scottish work? Should the devolved administration be expected or even required to foot the bill for these activities, as part of its enlarged taxing and spending powers, or should this work be funded as part of the CMA's own budgetary allocation?

It is undoubted that there are clear benefits associated with enhancing the role of the CMA as competition authority in Scotland, by adopting measures designed to "share" its powers more efficiently with the devolved administration, to encourage dialogue and interaction with individual ministers and, ultimately, increase the take-up of new Scottish cases in the future. However, the limited powers enjoyed by the Scottish Government, even in light of future changes of the status quo, and the corresponding need to maintain the independence of the CMA vis-a-vis political power are likely to play havoc with the viability of the reforms that the Smith Commission seeks to propose. There remains, of course, the possibility of encourage a "softer" sharing of powers, via milder form of partnership between the devolved administration and the competition agency: for instance, it may be queried whether imposing on UK Ministers an obligation to consult their Scottish counterparts in the event of a future reference or indeed requiring the CMA to seek views among Ministers North of the Border in cases that appear relevant to Scottish markets may be more viable alternatives to the conferral of "initiation"-type powers to members of the devolved administration. It is acknowledged that the CMA enjoys already the power to seek information and evidence in the course of its "normal" investigating functions, a power that could be feasibly exercise also with a view to seeking out the views of the Scottish Government, among other stakeholders. However, it is argued that recognising a formal obligation of doing so and enshrining it in a statutory framework could go some way toward ensuring that, albeit in a "mild" form, a degree of "devolution" is achieved to the benefit of the Scottish administration in the field of competition enforcement and in the respect of principles of transparency and of legal certainty.

In conclusion, the outcomes of the Smith Commission present the UK Parliament as well as the Parliament in Holyrood with a set of challenges and opportunities: the perspective of greater devolution should certainly be welcomed as a means to securing a stronger Parliament and Government in Scotland, albeit within the cohesive institutional framework of the UK as a whole. However, its implementation also requires great care in ensuring that all levels of government work together within this "whole" in a coherent and unitary manner. The enforcement of competition policy is not at all immune from these challenges: while it is recognised that the UK's internal market remains unitary in respect of the great majority of goods and services, thus fully justifying the retention of the CMA as a "UK wide" competition authority, it is indispensable to bring its activity as close as possible to local markets, including those confined to Scotland, are appropriately taken into account. Continuous dialogue and interaction with the devolved administration in the wider context of a formalised institutional framework, may provide the background against which these objectives may be achieved, in the spirit of "partnership" and of "compromise" to which the key stakeholders in the Smith Commission's work have committed themselves.